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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1331

LOUISIANA PUBLIC SERVICE COMMISSION ..... *Petitioner*

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA ..... *Respondents*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE OF THE STATE OF ARKANSAS and THE ARKANSAS PUBLIC SERVICE COMMISSION IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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Come now the State of Arkansas and the Arkansas Public Service Commission, by and through the Honorable J. Steven Clark, Attorney General of the State of Arkansas, and for their Motion for Leave to File Brief *Amicus Curiae* in Support of a Petition for a Writ of Certiorari states that:

(1) The people of the State of Arkansas, and the State of Arkansas itself, are significant users of intrastate and interstate telecommunications services and equipment. The State of Arkansas has, accordingly, established the Arkansas Public Service Commission to regulate public utilities providing telecommunications services within the State. The State

of Arkansas and the Arkansas Public Service Commission, therefore, have an interest in the outcome of this proceeding.

(2) Rule 36 of the Rules of the Supreme Court permit a State to file an *amicus curiae* brief where, as here, said brief is sponsored by its Attorney General.

WHEREFORE, the State of Arkansas and the Arkansas Public Service Commission pray for leave to file a brief *amicus curiae* in support of a Petition for a Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

The vast majority of the citizens of the State of Arkansas, and the State itself, receive telecommunication services from either Southwestern Bell Telephone Company, General Telephone Company of the Southwest, or Continental Telephone Company of Arkansas, all utilities subject to the interstate jurisdiction of the Federal Communications Commission (hereinafter, FCC). The charge these customers pay for their on-premises equipment is an important element of their monthly telephone bill. In fact, the customer premise equipment charge is so important, that State law has, for half a century, authorized the Public Service Commission to regulate it.

If the District of Columbia Circuit Court of Appeals' decision in *Computer and Communications Industry Association* v. *Federal Communications Commission*, 693 F.2d 198 (D.C. Cir. 1982), is not reversed, the protection state regulation has traditionally provided the customers of the affected utilities in the provision of customer premises equipment will be eliminated. In that decision, the court upheld a series of orders by the Federal Communications Commission decreeing that customer premises equipment, contrary to Arkansas law and practice, should be free from state regulation.[1]

The result below will obviously impair the ability of the State of Arkansas to insure that all its citizens have access to reliable telephone service at reasonable and nondiscriminatory rates. More disturbingly, the result below sets a precedent that may hasten the erosion of state power in an area historically reserved to the states, the regulation of local utility rates.

The Attorney General of Arkansas, empowered by Arkansas law to represent the public interest before state and federal courts and regulatory agencies, and the Arkansas Public Service Commission, the agency responsible under Arkansas law for the regulation of local utility rates, have a legitimate interest in the outcome of this proceeding.

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[1]Generally known as the "Computer II case," these orders were issued *In The Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828 and are reported as "Final Decision," 77 FCC2d 384 (1980), "Memorandum Opinion and Order," 84 FCC2d 50 (1980) and "Memorandum Opinion and Order on Further Reconsideration," 88 FCC2d 512 (1981).

SUMMARY OF ARGUMENT

A writ of certiorari should be issued by this Court to the court below for three reasons. First, the regulation or deregulation of customer premises equipment is an issue of substantial national importance. Second, the court below misapplied the preemption doctrine as developed in previous decisions of this Court. Third, the language of the Communications Act of 1934 does not authorize the FCC to prohibit state regulation of intrastate rates for customer premises equipment.

REASONS FOR GRANTING A WRIT

I. The Issue Is of Substantial National Importance.

Customer premise equipment (hereinafter, CPE) includes simply the equipment, from home telephones to office switchboards, necessary to access the nation's telephone network. The significance of the power of the states to regulate the provision and intrastate pricing of such equipment should be clear, especially in light of the FCC's commitment to deregulation.

This case raises fundamental issues involving the proper distribution within our federal system of power over the provision of utility services, issues which, in this context, are no less significant than those raised in similar cases recently heard by this Court. *Federal Energy Regulatory Commission* v. *Mississippi*, ___ U.S. ___, 102 S.Ct. ___, 72 L.Ed.2d 532 (1982); *Arkansas Electric Cooperative Corporation* v. *Arkansas Public Service Commission*, U.S. Sup. Ct. No. 81-731, *Pacific Gas and Electric Co., et al* v. *State Energy Resources*

Conservation & Development Commission, et al, U.S. Sup. Ct. No. 81-1945.

This case is, therefore, important to all consumers of telephone service, and to all the states which regulate it. For this reason alone, we would ask this Court to review the result below.

II. The Court Below Misapplied the Preemption Doctrine.

In holding that the FCC could preempt state power over CPE, the court below did not consider the guidance this Court has provided in determining when federal action should be held to preempt state action. Indeed, rather than relying on decisions of this Court, the Court of Appeals cited *New York State Commission on Cable Television* v. *FCC,* 669 F.2d 58 (2nd Cir. 1982) for the proposition that: "Federal regulation need not be heavy-handed in order to preempt state regulation."

A reviewing court must, however, start with the presumption that Congress did not intend to displace state law. *Maryland* v. *Louisiana,* 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed. 576 (1981). The leading case defining the preemption doctrine is *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) which provided that preemption would not be implied absent a clear conflict in state and federal law or a clear need for a uniform national policy. This case is not cited in the opinion of the court below.

In those cases where state regulation has been held preempted by federal regulation, there was a clash in

affirmative regulation at both levels, not the regulatory vacuum created here. *See, Tribe, American Constitutional Law* (1978), pp. 386-389. The fact Congress has created a regulatory agency to exercise some power in a given field surely cannot be held to authorize the federal agency to completely deregulate that field and expel the States from it. Most areas of American economic life have been placed under at least partial regulation by federal agencies. If the philosophy endorsed by the Court below survives judicial review, nothing, other than the discretion of federal administrators, will prevent transforming the states into administrative subdivisions of a central bureaucracy.

III. The Communications Act of 1934 Does Not Authorize the FCC to Prohibit State Regulation of Customer Premises Equipment.

Even ignoring the preemption doctrine, as the court below apparently did, the orders of the FCC should be reversed as contrary to the express provisions, and traditional application, of the Communications Act of 1934.

In at least two instances, Congress, in the Communications Act, reserved to the states the power to regulate the pricing of intrastate telephone service and equipment. First, Section 152(b) provides, *inter alia:*

> [S]ubject to the provision of Section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications service by wire or radio of any carrier. . . .[2]

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[2]47 U.S.C. §152(b).

Then, at Section 221(b), Congress provided:

> Subject to the provisions of Section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to . . . wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communications, in any case where such matters are subject to regulation by a State commission or by local governmental authority.[3]

In short, Congress has clearly sanctioned state rate regulation of primarily local telephone service. This would include the regulation of CPE. The FCC, itself, has admitted what common sense tells us; CPE is "used predominantly in intrastate communications." *Computer II, Final Decision*, 77 FCC2d 384, 456 (1980).

Consistent with the Communications Act, FCC involvement in ratemaking has generally been limited to fixing interstate toll rates. To do this, and to facilitate the separation of interstate toll revenue among telephone companies, the FCC has allocated a portion of each company's plant, including CPE, to the interstate market. The States have, however, been responsible for pricing intrastate toll rates, local access charges, and CPE.

Congressional acceptance of this practice over the years suggests that it properly implemented the intent of Congress in passing the Communications Act. Where Congress has

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[3] 47 U.S.C. §221(b).

acquiesced in a longstanding administrative interpretation of a statute, that policy should be held a proper expression of legislative intent. *See, U.S.* v. *Leslie Salt Co.*, 350 U.S. 383, 76 S.Ct. 416, 100 L.Ed. 441 (1956), *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 74 S.Ct. 745, 98 L.Ed. 933 (1954).

This should be especially true when a reversal of agency policy would restrict state authority in the field of utility regulation, an area the states have pioneered. *See, Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950) (Jackson, J., dissenting). But if left unchecked, the FCC may expand its conceded jurisdiction to assign costs in the development of interstate toll rates to emasculate the state commissions. Since virtually all telephone plant is used, to some extent, for interstate messages, the limits of FCC power, under the holding of the court below, are difficult to imagine. Already the FCC has attempted to preempt state authority to set depreciation rates, even for purposes of intrastate ratemaking. *In the Matter of Amendment of Part 31, Uniform Systems of Accounts for Class A and B Telephone Companies*, Docket No. 79-105, Memorandum Opinion and Order (January 6, 1983). Congress could not, in 1934, have envisioned, and the courts, today, should not permit, this invasion of traditional state prerogatives.

CONCLUSION

The State of Arkansas and the Arkansas Public Service Commission ask this Court to grant the Louisiana Public Service Commission's petition for a writ of certiorari to the United States Court of Appeals, District of Columbia Circuit.

Respectfully submitted,

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